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No. 90-32

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In The
Supreme Court of the United States
October Term, 1990

THE SECRETARY OF THE STATE OF FLORIDA,
and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE
WILLIAMS, GRACIE HOLTON, ROSA HENDERSON,
DELORES COLSTON, BARBARA KING, DOROTHY
ROBERTS, JACQUELINE ROSS, LINDA ISAAC,
AND CHARLES STEWART

Respondents.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

In Respondents' Brief in Opposition at i, 9, Applicants attempt to diminish the issue which the Eleventh Circuit's decision raised. The Eleventh Circuit by its decision, contrary to Applicants' argument, does change the established discrimination trial standards. Further, the decision places what could be an insurmountable burden on the defendant to produce testimony of the actual decisionmaker in order to successfully rebut a *prima facie* case.

ARGUMENT

The discrimination claims here involved employment decisions made years before trial – sometimes ten years before. The actual decisionmaker in a majority of instances had no independent recollection of the decision or was unavailable to testify. Testimony concerning an established policy to hire the most qualified coupled with documentary evidence in the form of employment records is sufficient to establish employer's articulation¹.

¹ In fact, Florida evidence included: testimony by Jay Kassees – the chief personnel official – which described and explained a). personnel rules, regulations and policies concerning each position [*see, e.g.*, R. 34-24; R. 34-27-28; R. 34-104; R. 34-116-117; R. 35-20; R. 35-35; R. 35-43]; b). personnel cards for each Applicant which contained date of hire, general employment history, demotions, etc. [*See, e.g.*, R. 28-28-37; R. 29-57; R. 29-101; R. 34-5; R. 34-25; R. 34-42; R. 34-52-53; R. 34-103]; the personnel files for each Applicant; [*See, e.g.*, R. 28-41-46; R. 29-61; R. 29-111; R. 34-43-45; R. 34-109; R. 35-21-28]; c). Plaintiffs' conditional performance reviews [*see, e.g.*, R. 28-37-41; R.

(Continued on following page)

The failure to call an actual decisionmaker is simply an additional evidentiary factor to be considered by the factfinder in deciding the pretext issue. Petition for Writ at 10, *Mills v. Ford Motor Comp.*, 800 F.2d 635, 639 (6th Cir. 1986).

The Petition should be granted. The Eleventh Circuit decision conflicts with precedent decisions of this Court and those of the lower courts in its *new* requirement that a specific form of testimonial evidence is necessary to constitute a successful employers' legitimate-reason articulation [See Petition, at 6-14].

Based on argument which is internally inconsistent, Applicants contend that the Eleventh Circuit did not mean that the actual decisionmaker must testify in order for employer to fulfill its burden to articulate a legitimate reason. Applicants assert that the Eleventh Circuit simply meant that *some person* must testify as to the subjective reasons for each decision. This is a distinction with no foundation – who but the actual decisionmaker could testify concerning subjective impressions? Interestingly at trial, Applicants successfully objected to introduction of opinion testimony, from e.g., the State of Florida Personnel Director, concerning the weight factors relevant to each candidate's credentials for a particular position and

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28-46-51; R. 34-6-12; R. 34-33-38]; d). performance appraisal system [see, e.g., R. 28-41-46]; e). class specifications for each position at issue [see, e.g., R. 29-58; R. 34-48; R. 34-142; R. 35-36]; f). attendance and leave sections [R. 34-35-38]. Florida also introduced testimony by supervisors and fellow employees [see R. 28-52-71; R. 29-30-47; R. 34-58-71; R. 34-82-93; R. 35-2-13; R. 35-75-86].

concerning which qualities would make the selectee the superior candidate. [See n.1 *supra* and R. 29-59-60, 64-65, 96, 113-14].

Further, an evaluation by the State of Florida Division of Administration concerning whether a candidate possesses the minimum qualifications to be considered for a position – a first step in the application process – does not establish that a candidate is qualified for a particular position. Some applicants, e.g., misrepresented their credentials on their employment applications. [See R. 27-19]. Applicants' contention that each individual's claim on appeal was one in which the individual established minimal qualification is erroneous. [Respondents' Brief at 5].

Applicants in support of the Eleventh Circuit's decision, assert that they were unable to establish pretext because "Employer produced *no evidence* which addressed the motivation or rationale for any of the employment selections at issue." Respondents' Brief at 5-6. In fact, Florida presented a quantity of evidence to establish the reason for the hiring decision in each instance. Applicants and the Eleventh Circuit mischaracterize employer's objective and documentary evidence as a presentation which fails to establish a reasonably specific legitimate reason. Florida's evidence in rebuttal constituted a clear articulation. Plainly, the Eleventh Circuit decision departs from burden of production standards established under the *McDonnell Douglas-Burdine* cases and their progeny, i.e., that employer maintains the burden to present *evidence* of a legitimate reason.

The Eleventh Circuit decision and its characterization by Applicants here, in effect places upon the employer the burden of proof – a burden which under *Burdine* standards is to be carried at all times by plaintiffs. Employer does not maintain the burden of *proving* that the actual decisionmaker did not reject the plaintiff because of racial animus. Employer simply has the burden to *produce* evidence that its decision had a legitimate basis after Applicant establishes a *prima facie* case. Under the applicable case law, the production by employer can occur through submission of subjective or objective, testimonial or documentary evidence. See *Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Under any of those circumstances the employer's asserted reasons becomes clear enough to allow applicants to attempt to establish pretext.

Where an employer presents testimony that it is the employer's policy to hire the most qualified, and the employer then introduces each applicant's record, the applicant then has sufficient evidence for going forward – contrary to Applicants' assertion here. For example, if the employer presents the successful candidate's credentials which show five years of experience and a college degree, applicant could easily attempt to cast aspersion on employer's articulation by showing that applicant also has a college degree and five or more years of experience, and by producing anecdotal evidence, e.g., that employer has made racially disparaging comments. The burden of proof remains with applicant.

Applicants in this case did not even attempt to rebut Florida's evidence of choosing the most qualified. [R. 32-46-210]. This was so, not because Florida failed to

produce a reasonably specific articulation, but because Applicants did not have access to any evidence which would tend to show discrimination beyond the prima facie case assumed by the trial court. This was exceedingly clear to the factfinder after hearing and observing plaintiffs and defendants during eleven days of trial testimony. [See App. 43a-80a].

Applicants here offered no anecdotal evidence at trial and their expert statistical testimony has been fully discredited by the Eleventh Circuit. Consequently the result here, unless the trial court permits further testimony from the parties, is grossly unfair – the Applicants would be permitted recovery based only on the skimpiest prima facie evidence.

The Eleventh Circuit was wrong. Under its decision, Applicants may argue they are entitled to prevail if they present a prima facie case and the employer does not produce the subjective testimony of the actual decision-maker – notwithstanding the fact that the employer produces a wealth of non-testimonial, objective evidence of its legitimate reason, as Florida did here. To label such evidence as no evidence at all conflicts with the standards for a discrimination case. See, Petition at 15, 17, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). The wrongheaded reasoning of the Eleventh Circuit can best be exemplified by presenting the case regarding one applicant, Delores Colston.

Colston was terminated by Florida on April 22, 1977, at the request of Mary Singleton, a black female, for insubordination and physically abusing her supervisor. [R. 27-12; Defendant's Exhibit 8-J(2)]. Colston admitted

this at trial. [R. 27-12]. She further admitted that she had received several official reprimands. *Id.* A written reprimand was admitted into evidence and revealed criticisms of Colston's "attitude, compatibility, initiative, personality, loyalty and sincerity" [2 SR 1-9; Defendant's Trial Exhibit 8-J(1)]. Colston admitted other malfeasance on the job, e.g., that she had been reprimanded for " . . . breaking with others that I shouldn't have been breaking with". [R. 27-30]. Colston certainly did not even attempt to establish that the selectee, for any of her contested positions, had equal or inferior qualifications.

Colston brought claims for denial of appointment, to certain positions following her discharge. Colston admitted at trial that she omitted her dismissal from the subsequent employment application in question. [R. 26-19].

The trial court determined, based on the totality of the evidence, that Colston failed to rebut Florida's "articulation" that it hired the best qualified as evidenced by Colston's employment records and those of the successful candidates. [App. 76a]. The court further found that Colston failed to prove intentional discrimination. [App. 76a].

Ironically, under the Eleventh Circuit decision Colston could argue that she is entitled to prevail if she can establish a *prima facie* case, where Florida does not produce the actual decisionmaker to testify that her proclivity toward raucous and insubordinate behavior made her less qualified than the successful candidate. Such results would be patently unfair and conflict with the precedent case standards. Just as a court is not permitted

to require the plaintiff to submit direct evidence of discriminatory intent by employer, the Eleventh Circuit should not be permitted to establish a standard requiring the employer to submit direct evidence of a non-discriminatory reason. *See, Aikens*, 460 U.S. 709 (1983).

Contrary to Applicants' claim, the case here was clearly tried on the merits and was subject to review only under the clearly erroneous standard. It was the trier of fact who was in position to weigh the evidence presented by both parties and make those factual determinations necessary to enter judgment. [*See*, App. 20a-80a].

A discrimination trial should be no different than trials based on other types of claims wherein certain facts may be used to establish a rebuttable presumption. The party faced with a presumptive fact is simply required to come forward with evidence to rebut that presumption, not a specific type of evidence. The quality of the evidence goes to the ultimate issue of intent as the *Mills* court, *supra*, explained. The burden of *proof* remains upon the plaintiff. A fundamental error here is the seeming confusion of the burden of production with the burden of proof. Under *Burdine* standards, as further defined in *Aikens*, the employer maintains a *burden to produce* evidence of a legitimate motive. The plaintiff at all times maintains the *burden of proof*. Once the presumption drops from the discrimination case it is the factfinder who must decide the ultimate issue: whether defendant intentionally discriminated against plaintiff. Unless clearly erroneous, that decision should not be disturbed upon review by return to a stage by stage analysis. [*See* Petition at 14-18].

For each claim here which Applicants could identify, Florida established: a) that the Applicant maintained a negative employment record, whereas selectee did not; *or* b) that selectee had generically superior educational and experience credentials; *or* c) that selectee had favorable friendship or political connections. [App. 43a-79a]. These relative qualifications were either evident on the face of the employment record or established through witness testimony. A mystery did not surround the employment decisions, contrary to the suggestion in the decision below. It is somehow ludicrous to suggest that a decision-maker's ten-year-old recollections are acceptable whereas facially clear documentary evidence and explanations of employment policy are not. Further evidence does not exist – and indeed Applicants presented no record cite – that a decisionmaker's notes concerning subjective impressions are maintained in Florida's records, as Applicants contend. [Respondent's Brief at 13].

The claims here involved office positions. Florida's assertion that the best qualified individual was chosen, combined with Florida's production of documents which revealed, e.g., that selectee had either a) more education, b) more experience in a given field, c) that the rejected Applicant had a history of malingering, altercations with the public, or d) unsatisfactory evaluations by minority evaluators. [See, e.g., R. 26-16 (evidence that Rosa Henderson received conditional and unsatisfactory evaluations from black evaluators)], was specific enough to fulfill the employer's burden. Often, the testimony by Applicants at trial enabled the trial court to verify the validity of documented inadequacies of a particular applicant – e.g. the

trial court's finding that Rosa Henderson had demonstrated a "bad attitude" in court and that conduct was consistent with the defendants' position at trial. [See App. 70a-74a]. The Eleventh Circuit was wrong to establish that this quantity of evidence did not constitute a successful articulation because subjective decisionmakers' testimony was not included.

CONCLUSION

The Eleventh Circuit was clearly wrong in its devaluation of objective and documentary evidence in conflict with the precedent cases of this Court and the decisions in other circuits. The balance of shifting burdens in the discrimination arena should not be weighted to favor the complainant over the employer. Certiorari should be granted for plenary review or in the alternative, to vacate and reverse or remand.

Respectfully submitted,

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